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No. 237

IN THE

Supreme Court of the United States

October Term, 1956

ALBERT H. SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO CERTIORARI

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The government joined its brief in opposition here with its brief in opposition in case No. 246.

Because joinder has plagued Smith from the outset of this case which could only be remedied by a severence, we invite the Court's attention to the argument in the government's brief in opposition where it is shown how easy it is even for those skilled in the law to mingle the case of Smith with that of the other defendants. At page 16 the government states:

> "Clearly, the activities of the petitioners were sufficiently related—particularly since all, to the knowledge of the others, dealt with the same group of officers—so that the joinder of the substantive charges, without more, could not be said to be prejudicial."

There is no evidence that Smith ever knew, saw or had any contact or conversation with any of the defendants at the trial except Simkins. Yet the government, above, gives the impression that the evidence showed Smith was hand-in-glove with *all* the other defendants. The evidence shows Smith knew only one defendant, Simkins.

The government relies on *Rule 8, F. R. Cr. P.* to permit joinder.

The very heart of Smith's contention is that severence should have been granted pursuant to *Rule 14, F. R. Cr. P.*

The Court below in its opinion isolated Smith as having properly moved for severance (App. to Petition, p. 31). Similarly, the Solicitor General in opposing certiorari herein concedes that Smith appropriately moved for severance (Govt. brief, p. 16).

Because of the commingling of prejudicial testimony, particularly in a mass trial such as was had here, it was difficult, if not impossible, for Petitioner Smith to make his own case stand on its merits.[1]

His participation in the conspiracy was found by the jury's verdict to be non-existent. Even the allegations of the indictment charge that Smith's alleged participation in the conspiracy was quite minimal. The 26 overt acts of the alleged conspiracy occurred on various dates between October 29, 1953, and September 14, 1954, and concerned Smith only on June 9, 1954, and June 21, 1954. The June 9, 1954, occurrence (overt act No. 14) was the basis of substantive count five which alleged that Smith, Simkins and Anderson bribed Lt. Thoman, a member of the Metropolitan Police Department to be faithless to his trust as a police officer. During the trial, it was contended by the government and the Court charged that Smith was an aider and abettor (T. 3025) of Simkins in the bribery of Thoman. Smith was convicted on this count only.

Except for the conspiracy count, the bribery of Thoman on June 9, 1954, by Simkins, aided and abetted by Smith (count 5), could not have been joined under *Rule 8, F. R.*

[1] Cf. Concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *U. S.*, 336 U. S. 440, 445; *Marcante* v. *U. S.* (CCA 10th) 49 F. 2nd. 158.

Cr. P. with the offense of Anderson on April 16, 1954 (count 2) or his offense on May 20, 1954 (count 3), of King's offense on May 23, 1954 (count 4), or King's offense on June 29, 1954 (count 6), or Anderson's offense on July 3, 1954 (count 7), or Simkins' offense on July 3, 1954 (count 8), or Taylor's offense on July 7, 1954 (count 9), or the bribery of Monroe by Winston and King on July 9, 1954, and August 19, 1954, as alleged in counts 10 and 13, or the receipt of the same bribe by Monroe from Winston and King as alleged in count 11, or the bribery of Thoman by Winston and King on August 18, 1954, and August 19, 1954 (counts 12 and 14), or the bribery by Simkins of Thoman on August 19, 1954, as alleged in count 15, and similarly the offenses alleged against defendants other than Smith in counts 16, 17, 18 and 19. Such a joinder would be outlawed by *Sections (a) and (b) of Rule 8, F. R. Cr. P.* as a misjoinder both of offenses and defendants. Smith simply had nothing whatever to do with these substantive offenses.

Thus there is squarely presented whether in the circumstances of this case the relief as provided in *Rule 14, F. R. Cr. P.* should have been granted Smith.

The character of testimony presented at the trial and recited in the government's brief in opposition to certiorari herein (pages 6 to 12) was inflammatory. It showed venality in the police department which is abhorrent to good government and strikes at the very core of law enforcement. The danger of contamination by a joint trial was real.

With this background, we find it difficult to rationalize the government argument herein that prejudice did not result to Smith. Its brief ignores the realities of the situation in which Smith found himself.

The very nature of the case was such that all of the law's safeguards as provided in *Rule 14, F. R. Cr. P.* should be applied, lest the commingling of prejudicial tes-

timony should react unfavorably to Smith, who was charged with but one substantive offense. The indictment charged eighteen (18) substantive offenses of giving or receiving bribes.

Frequently, it is the character of the crime and the defendants that is one of the controlling factors in ruling on a motion for severance. In a case such as this, the jury may transfer, whether consciously or otherwise, the proof from one count to the other, or from one defendant to the other.

We submit the danger of such transfer to Smith was real. To avoid this danger, he sought a severance. This was done after the opening statement of the prosecutor when first its full impact was ascertained (Tr. 188). This was repeated at the close of the case when we knew the danger existed (Tr. 2651). The very comprehensive charge by the trial Court could not cure the evil then existent.

The burden of defending Smith for aiding and abetting Simkins in the bribery of Thoman on June 9, 1954, as alleged in count five was far greater by reason of the trial of several others at the same time for distinct and separate offenses committed before and after June 9, 1954, as alleged in the remaining seventeen (17) substantive counts.

It was difficult, if not impossible, for Smith in this trial to stand alone in this drama of police corruption extending over a period of eleven months among many people and at variant places in the District of Columbia, while he was charged in one substantive count only[1] and even then the government contended and the Court charged him to be an aider and abettor of Simkins (Tr. 3025).

The case of *Opper* v. *United States*, 348 U. S. 84, 95, to the effect that our theory of trial relies upon the ability of the jury to follow the Court's instructions is subject

[1] He was acquitted on the conspiracy count.

to the severance rule. Otherwise, there would have been no need for the rule.

This Court said in *Kotteakos* v. *United States*, *328 U. S. 750, 773*:

> "When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."

In this case, the acquittal on the conspiracy count of all the eight defendants, except Monroe and Prather, indicates that Smith, who was in no manner connected with either Monroe or Prather, did not conspire so as to invite a mass trial.

To be tried en masse for a conglomeration of distinct and separate offenses committed by others violates the fundamental principles of a fair trial. It rendered difficult, if not impossible, Smith's ability to make his case stand on its own merits.

We do not contend the jury disregarded the Court's charge as the government argues on page 17 of its brief in opposition herein. We simply contend that it was quite impossible for the jury to ignore the mass of unrelated inflammatory testimony, all of which was unrelated to Smith's activities. In such a situation, reason dictates and experience compels but one conclusion. Prejudice could not be excluded.

Severance was the only remedy and should have been granted to Smith upon his motion which the government herein as well as the Court below concede he made.

The petition should be granted.

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